Supreme Court, U.S.
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No. 04-168

IN THE

Supreme Court of the United States

JOSEPH LEE GRIMM,

Petitioner,

v.

CHARLES S. SPELL, a/k/a STEVE SPELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETER VASQUEZ AND PROSSCOVIA BIRIBAWA

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INTRODUCTION

Petitioner, Joseph Lee Grimm, has not identified any basis for invoking this Court's very narrow certiorari jurisdiction. He has not alleged any conflict among the Circuits or asserted the need for resolution of a question of federal law that has not been previously addressed. On the contrary, this Court has already examined and crafted the law regarding the primary issue presented in his Petition—the parameters of qualified immunity afforded a government official. Moreover, the Eleventh Circuit Court of Appeal, which affirmed the dismissal of Grimm's action on the basis of qualified immunity, had the benefit of, and applied, this Court's most recent pronouncement of applicable law when it reached its appropriate conclusion. Therefore, it is apparent that Grimm is seeking *de novo* review of the case presented without identifying any basis for invoking this Court's jurisdiction.

Notwithstanding the lack of any basis for invoking this Court's discretionary review, the Eleventh Circuit's conclusion is completely correct. Respondents, Prosscovia Biribawa and Peter Vasquez, employees of the Department of Agriculture and Consumer Services (the "Department"), reasonably believed they were authorized to enter Grimm's yard to look at leaves on citrus trees pursuant to a statutory grant of authority and the Florida Commissioner of Agriculture's clear declaration of emergency. At the time the Department employees entered Grimm's yard for this limited purpose, no Florida Court had contradicted the statutory authority to conduct a warrantless search and, in fact, multiple Florida courts recognized the exigent circumstances posed by citrus canker that required immediate inspection and tree removal. The Court should deny the Petition.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition because the law was not so well-settled at the time the Department employees entered Grimm's property that they should be denied qualified immunity and held individually liable for alleged Fourth Amendment violations.

When the Department employees entered Grimm's property for the limited purpose of examining leaves on a citrus tree, Florida law clearly authorized the limited intrusion due to exigent circumstances presented by citrus canker's onslaught. That a Florida state court years later decreed that state authorities needed a warrant to inspect dooryard citrus cannot override qualified immunity when contrasted with existing Florida law at the time the Department employees conducted the subject inspection.

Furthermore, the entry onto property for a limited inspection of a citrus tree does not constitute a taking which requires compensation under the Fifth Amendment. There is no seizure of property or deprivation of the economic benefit of property resulting from the inspection.

Finally, Grimm cannot assert an equal protection claim because he has not alleged membership in any protected class or that he received unequal treatment from the Department.

STATEMENT OF THE CASE

Because the United States District Court, Middle, District, disposed of this case at the pleading stage, all of Grimm's allegations are accepted as true and correct. For the benefit of the Court, however, the following is a history

of Florida's battle with citrus canker and the Citrus Canker Eradication Program ("CCEP") enunciated by Florida's Supreme Court in *Haire v. Fla. Dep't of Agriculture,* 870 So. 2d 774 (Fla. 2004), citing *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 541-42 (Fla. 4th DCA 2001):

> Citrus canker was discovered in Florida in 1914 and eradication programs continued through the mid 1930s. In the mid 1980s, an Asian strain of citrus canker, xanthomonas axonopodis pv. citri., the strain of citrus canker at issue in this case, was discovered in Manatee County. It was considered eradicated in 1992 and the eradication program halted in 1994. However, in 1995 an outbreak was discovered around the Miami International Airport.
>
> Citrus canker is a disease that is caused by a bacterial organism that attacks the fruits, leaves and stems of a citrus plant. It causes defoliation, fruit drop and loss of yield. It also causes blemishes on the fruit and a loss of quality. In severe cases, it can cause girdling of the stems and death of the tree.
>
> Stem lesions can survive for many years and are capable of producing bacterial inoculum eight to ten years later. Although symptoms of citrus canker may be seen seven to fourteen days after infection, the maximum visualization does not occur until approximately 107 to 108 days after infection. This makes it difficult to control a disease which easily spreads through wind-driven rain or contamination of equipment or plant material.

* * * *

At the time that citrus canker, Asian strain, was discovered in Miami, the citrus canker eradication program in place called for the destruction of trees that were infected or were within a 125 foot radius of an infected tree. The 125 foot radius was adopted in the 1980s as a result of a study conducted in Argentina. However, that study did not take into account what would happen in an urban setting.

In Miami-Dade County, the destruction of citrus trees within a 125 foot radius of an infected tree was not reducing the occurrences of citrus canker. Therefore, the Department decided to initiate a study that would measure the distances that citrus canker, Asian strain, would spread in South Florida. The study kept track of over 19,000 trees in four sites and determined the distance between the diseased trees and the newly infected trees. The study showed that the eradication program which used the 125 foot radius was inadequate because it only captured about thirty to forty-one percent of infection that spread from a diseased tree.

The results of the study were presented at a meeting in Orlando attended by approximately twenty individuals and scientists. Those at the meeting examined the findings. After considering a range of distances between diseased trees and newly infected trees at the various sites, those present determined that in order to destroy ninety-

> five percent of newly infected trees, it was necessary to destroy trees within a 1900 foot radius of a diseased tree, thereby creating a buffer zone which would prevent citrus canker from spreading any further.
>
> In March 1999, the Citrus Canker Technical Advisory Task Force, a body of regulatory individuals, scientists and citrus industry representatives who deal with the issue of citrus canker, unanimously recommended that the Department adopt a policy to destroy trees within a 1900 foot radius of a diseased tree in order to eradicate citrus canker.

Florida courts have wrestled with various issues pertaining to the CCEP and the balance between fighting a virulent pathogen that spreads quickly and threatens both the State's citrus industry and residents' welfare and affording citizens the highest possible measure of due process and access to judicial review.

The case at hand stems from Grimm's assertion that the Department employees had no right to enter his yard and inspect his citrus trees without a search warrant. At the time of the inspection, no Florida court had required a warrant for such inspections or declared such inspections unconstitutional. In 2003, however, three years after the inspection at issue in this case, Florida's Fourth District Court of Appeal analyzed the warrant requirement and concluded that certain parts of a yard may be deemed curtilage and concluded that the Department must procure a warrant to inspect trees for citrus canker. *Dep't of Agriculture v. Haire,*

836 So. 2d 1040, 1054-5 (Fla. 4th DCA 2003). Nonetheless, the district court dismissed Grimm's lawsuit and the Eleventh Circuit affirmed the dismissal.

ARGUMENT

I. GRIMM HAS NOT IDENTIFIED ANY BASIS FOR THIS COURT'S LIMITED JURISDICTION.

While the parameters for Supreme Court Jurisdiction are malleable, a litigant seeking this Court's review must typically establish a threshold basis for jurisdiction. Ordinarily, such jurisdiction arises when a conflict exists among the Circuit Courts of Appeal, when a court of last resort decides a question of federal or constitutional law that conflicts with this Court's jurisprudence, or when a decision depends upon an interpretation of federal law that should be decided by this Court but remains unresolved or an interpretation that violates federal law. None of the jurisdictional prerequisites are implicated in this case.

On the contrary, this Court addressed the contours and scope of qualified immunity in *Hope v. Pelzer,* 536 U.S. 730 (2002). Therefore, qualified immunity jurisprudence is settled, and there is neither a split among circuits nor an unresolved question of federal law. Indeed, *Hope* arose out of the Eleventh Circuit, which had direct experience with this Court's application of the appropriate qualified immunity standard. Moreover, the Eleventh Circuit applied *Hope* when it dismissed Grimm's Complaint, and Grimm does not now raise any issue suggesting that the Eleventh Circuit erred in that application. Similarly, Grimm has not alleged or established a violation of the Fifth Amendment or the Equal Protection clause. Therefore, this Court should decline to extend jurisdiction and reject his Petition.

II. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED DISMISSAL OF GRIMM'S COMPLAINT BECAUSE THE LAW GOVERNING THE DEPARTMENT'S RIGHT TO INSPECT DOORYARD CITRUS LEAVES WAS NOT ESTABLISHED AT THE TIME OF THE ALLEGED FOURTH AMENDMENT VIOLATION.

Qualified immunity affords broad protection to "all but the plainly incompetent or those who knowingly violate the law." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990); *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989). Qualified immunity is evaluated by an objective standard. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1999). A government official proves that he acted within discretionary authority by showing objective circumstances which would compel the conclusion that the actions were undertaken pursuant to performance of duties and within the scope of his authority. *Id.* (citing *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)).

To defeat the qualified immunity defense, Grimm had to "prove the existence of a clear, factually defined, well recognized right of which a reasonable [government official] should have knowledge" and that a reasonable official would have understood that his actions would have violated that right. *See Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989).

When the Department employees entered Grimm's yard for the limited purpose of inspecting leaves on citrus trees, they operated under a good faith belief that exigent circumstances authorized the inspection without a warrant. Even if a law enforcement officer engages in conduct that

violates a person's constitutional rights, he or she may avoid personal liability if it was not reasonably clear that the conduct at issue violated such a right. Qualified immunity operates to "ensure that before they are subject to suit, officers are on notice their conduct is unlawful." *Hope,* 536 U.S. at 739.

Following *Hope*, this Court narrowed the application of qualified immunity to some degree, but did not undermine the extraordinary protection from suit the doctrine provides. Under the *Hope* decision, evaluating qualified immunity requires a Court to first determine whether a constitutional violation exists. If so, then the Court considers whether the contours of that right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 739. Under this analysis, an official must have "fair warning" that his or her conduct deprived the victim of a constitutional right. *Id.* at 739 (citing *United States v. Lanier,* 520 U.S. 259 (1997)). *Hope* narrowed the scope of qualified immunity slightly by holding that prior case authority need not be materially similar in order to serve as fair warning that certain conduct violates a person's constitutional rights. *Hope,* 536 U.S. at 739. In order to apply *Hope,* however, it is imperative to analyze the case within the context of its facts and to recognize that certain fundamental rights are so obvious, that fair warning is presumed.

In *Hope,* prison guards chained a prisoner to a hitching post for seven hours, depriving him of water and food and taunting him as he suffered. The Court concluded that such treatment, which transpired after alleged misconduct by the inmate, served no true penal purpose and violated the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 738. Reversing the Eleventh

Circuit's analysis and holding as too rigid, the Court determined that basic principles of fundamental human dignity need not be articulated by prior judicial authorities to provide fair warning to law enforcement officials that the subject conduct violated the Eighth Amendment. *Id.* at 738.

The case at hand, however, is fundamentally different and *Hope* does not undermine the Eleventh Circuit's conclusion. Indeed, unlike the conduct condemned in *Hope,* which violated basic principles of human dignity, the conduct at issue in this case—the inspection of citrus trees in someone's yard—constituted at worst a minimal intrusion that, to the Department employees, could not be perceived as a Fourth Amendment violation. Moreover, existing Florida statutes, administrative codes, and case authority makes reasonable the Department employees' belief that such a warrantless search was authorized and lawful.

A. Respondents reasonably believed that they were authorized to conduct a warrantless search under the exigent circumstances exception to the warrant requirement.

Grimm relies primarily on the landmark decision of *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), which he asserts put the Department employees on fair notice that their actions were unlawful. *Camara*, however, was factually distinct and contained exceptions to the warrant requirement, such that Respondents had good reason to believe that *Camara* did not prohibit their conduct.

Camara did not clearly establish that warrantless searches under longstanding state statutory authority in an

agricultural plant disease emergency were unreasonable under the Fourth Amendment. Moreover, *Camara* did not provide fair warning to the Department employees that mere entry and inspection of trees violated the Fourth Amendment. *Camara* did not involve an emergency situation as is always present with a rapidly-spreading disease. In *Camara*, an ordinance permitted city officials to enter "any building, structure, or premises" to "perform any duty imposed on them." 387 U.S. at 526. The intrusion in *Camara* was far more invasive, because there, the statute allowed the entrance into a dwelling without any probable cause for inspection. *Id.* Here, the Department employees, in the midst of a plant disease emergency that seemingly provided probable cause for inspecting citrus trees, inspected only dooryard citrus, without entering any dwelling place.

Moreover, there are two exceptions to *Camara* where courts have dispensed with warrants for some searches that appeared to apply. First, the *Camara* Court recognized that exigent circumstances would obviate the need for a warrant: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law was traditionally upheld in emergency situations." The seizure of unwholesome food products or to prevent the spread of disease constitutes an exigent circumstance for which a warrantless search or seizure is appropriate. 387 U.S. at 539. The Supreme Court cited cases where the emergency involved unwholesome food, human disease, and animal disease. *See North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905) (compulsory smallpox vaccination). Indeed, courts have historically applied this analysis when facing emergencies that threaten

livestock, even if such emergencies do not pose an imminent threat to human life. For example, in *Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929), the Court recognized the need for immediate destruction of tubercular cattle. So, too, did Florida law require the immediate destruction of a plant pest that poses an emergency. *See* § 581.111, Fla. Stat. (2000) (defining "emergency" as "any situation in which the department has declared a plant pest or noxious weed to be a public nuisance or when in the opinion of the department a plant pest or noxious weed endangers or threatens the horticultural and agricultural interest of the state").

The Florida Legislature, the Commissioner of Agriculture, and Florida courts have characterized citrus canker as an emergency that required immediate action. In *Denny v. Conner,* 462 So. 2d 534, 536-37 (Fla. 1st DCA 1985), the court recognized that "the threat to the public interest in the citrus industry represented by citrus canker is of sufficient gravity and urgency that the effect of the immediate final order of the department should not be further stayed by this court." *See Nordmann v. Florida Dep't of Agriculture,* 473 So. 2d 278, 279 (Fla. 5th DCA 1985) (approving the Department's emergency measures, and rejecting the owner's contention that the Department has "failed to show imminent danger justifying use of the state police power to destroy the trees"); *Sapp Farms, Inc. v. Dep't of Agriculture*, 761 So. 2d 347, 348-49 (Fla. 3d DCA 2000) (relying on *Denny* and upholding the Department's ability to remove trees exposed to citrus canker); *Dep't of Agriculture v. Sun Gardens, LLP,* 780 So. 2d 922, 924 (Fla. 2d DCA 2001) (recognizing the Department's finding of "possibly devastating effect of citrus canker on the citrus industry"); *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 542 (Fla. 4th DCA 2001); *Haire*, 836 So. 2d 1047-50 (recognizing

Legislature's ability to protect citrus industry in agricultural emergency).

On June 15, 2000, in adopting amendments to the plant disease laws of Florida, the Florida legislature recognized the increasingly-acute nature of this emergency. The legislature made several findings:

- an emergency exists in the South Florida area regarding the spread of citrus canker, a bacterial disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit;

- joint state and federal attempts to eradicate citrus canker have so far been unsuccessful;

- despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County;

- if not eradicated quickly, citrus canker will spread to other parts of the state and may destroy the citrus industry and dooryard citrus throughout Florida;

- recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus

> trees will develop the disease from wind-blown rain or by other means.

See Ch. 00-308, Laws of Fla. No court had challenged the Legislature's findings at the time the Department employees inspected Grimm's tree.

B. The Department employees reasonably believed that the inspection of Grimm's tree was exempt from the warrant requirement under the traditionally regulated sector exception.

Second, the status of citrus as a traditionally regulated sector in the livelihood and economy of Florida made warrantless searches seemingly plausible. This Court had recognized that a search warrant is not generally required in state sectors that have been pervasively regulated and subject to close supervision and inspection. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). *Accord Blue v. Koren*, 72 F.3d 1075, 1080 (2d Cir. 1995) (extensive warrantless surveys and inspections valid regardless of motive because of strong governmental interest and pervasively regulated nursing industry); *United States v. Argent Chem. Lab, Inc.*, 93 F.3d 572, 574 (9th Cir. 1996) (warrantless search and seizure of veterinary drugs valid because of strong state interest in controlling misuse).

Agriculture, plant pests, and citrus have been pervasively regulated in Florida. *See generally* Chs. 570-604, Fla. Stat. (2000), and especially Chs. 570 and 581; Chs. 5A-5L, Fla. Admin. Code, and especially Ch. 5B. In particular, the Florida legislature had authorized the Department to control and eradicate plant diseases. *See* § 581.031(7), (15), (17), Fla. Stat. (2000). Indeed, Florida had fought against citrus

canker and other agricultural pests for many years, and agriculture, particularly disease-susceptible plants, have been regulated in Florida for over 100 years. *See* Fla. Const. of 1885, art. iv, § 20 (creating post of Commissioner of Agriculture); Ch. 581, Fla. Stat. (historical note documents creation of State Plant Board in 1927 to control agricultural pests); *Richardson v. Baldwin*, 124 Fla. 233, 168 So. 255 (Fla. 1936) (reciting duties of State Plant Board). The destruction of trees infected or exposed to citrus canker, under the power conferred in the Florida Statutes, was recognized by the Florida Supreme Court after the initial 1985 outbreak of canker in this state. *Dep't of Agriculture v. Polk,* 568 So. 2d 35, 37-40 (Fla. 1990).

In order for warrantless administrative search to be reasonable, there must be a substantial state interest behind the regulatory scheme; the search is necessary to further that scheme; and the authorizing statue is an adequate substitute for the warrant requirement in giving notice to owners and limiting discretion of those conducting the search. *See New York v. Burger*, 482 U.S. 691, 702-704 (1987) (warrantless search of automobile junkyard valid because conducted pursuant to statute, necessary to further state interest in detecting stolen cars, and discretion of officer conducting the search limited); *Showers v. Spangler,* 182 F.3d 165, 172 (3d Cir. 1999) (warrantless administrative search of taxidermist's business would be valid if taxidermy were pervasively regulated business); *United States v. Cobb,* 975 F.2d 152, 156 (5th Cir. 1992) (warrantless administrative search of trucking company justified because part of company's business included pervasively regulated motor vehicle salvage operation); *United States v. Branson,* 21 F.3d 113, 116 (6th Cir. 1994) (warrantless administrative search of auto repair shop valid because of business' statutory

regulation); *LeRoy v. Illinois Racing Bd.*, 39 F.3d 711, 713-14 (7th Cir. 1994) (warrantless administrative search of racehorse owner's automobile at race track valid because horse racing pervasively regulated industry); *Schwartz v. Pridy,* 94 F.3d 453, 457 (8th Cir. 1996) (warrantless administrative search justified because auto parts industry was pervasively regulated); *Winters v. Board of County Comm'rs,* 4 F.3d 848, 853 (10th Cir. 1993) (warrantless administrative search of pawnshop valid because pawnshops are pervasively regulated); *Moore v. State*, 442 So. 2d 215, 216 (Fla. 1983) (warrantless administrative searches of automotive repair shops constitutional). It was not clearly established that warrantless citrus canker inspections did not fit within this framework at the time the Department employees inspected Grimm's trees.

Moreover, to the Department employees, working in the field and unschooled in the nuances of Fourth Amendment jurisprudence, *Camara* does not support a holding that the law was clearly established that warrantless searches under the CCEP were unconstitutional at the time of the inspection. On June 19 and 20, 2000, when the Department employees entered Grimm's property, no Florida court had declared the applicable statutes or rules unconstitutional on Fourth Amendment grounds. Two circuit court judges did subsequently rule that warrantless searches were unconstitutional. One decision was vacated on appeal, and the other withstood scrutiny. *See Dep't of Agriculture v. Miami-Dade County*, 790 So. 2d 555 (Fla. 3d DCA 2001) (vacating trial court decision); *Dep't of Agriculture v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2003), *aff'd,* 870 So. 2d 774 (Fla. 2004). In *Miami-Dade County,* the earlier decision, Judge Gerald Cope, concurring, opined that the Third District should address the warrant issue and intimated that a warrant

is not required under the circumstances presented. As he wrote:

> The County and the City appear to take the position that the entirety of a homeowner's yard qualifies as cartilage and that the Department cannot enter into any part of the yard without a search warrant. That position is incorrect.

Id. at 559. That the majority of the Third District Court of Appeal at that time decided not to reach the warrant issue is irrelevant for purposes of qualified immunity analysis. Indeed, if a member of Florida's Third District Court of Appeal, in hindsight and with considerable deliberation, believed that a warrant was not required in every case when the Department inspected citrus trees on a person's yard, then it was reasonable for the Department employees in the field to believe that they were not violating Grimm's Fourth Amendment rights when they conducted their inspection one year earlier.

Grimm's argument that the Eleventh Circuit disregarded federal law is misplaced. Both the district court and the Eleventh Circuit Court of Appeal considered all constitutional law, both from federal and state courts in the context of determining whether *Camara* had ever been applied in circumstances of searches pursuant to the CCEP. Nonetheless, no federal court at that time, or since, has opined on the issue whether a warrant is required for a citrus canker inspection. The law that has developed since the time of the inspection of Grimm's property is found in Florida state appellate court decisions exclusively. Therefore, the Eleventh Circuit correctly evaluated and applied Florida as well as federal law pertaining to the CCEP and the warrant requirement generally.

III. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE MERE ENTRY ONTO GRIMM'S PROPERTY TO INSPECT CITRUS LEAVES DID NOT CONSTITUTE A TAKING AS DEFINED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Grimm argues that that the mere inspection of his trees and entry into his yard constituted a taking requiring compensation under the Fifth Amendment to the United States Constitution. The District Court held, and the Eleventh Circuit affirmed, that Grimm had failed to plead a taking because no property had been taken in the inspection.

Grimm argues that the search itself, without more, constituted a taking in both the regulatory and physical sense. There was a physical taking, Grimm argues, because he was deprived of his "right to exclude others" during the search. The concept of a taking under the Fifth Amendment does not extend as far Grimm contends. Under Grimm's logic, every search—indeed even every infringement of a constitutional right—would constitute a taking requiring compensation as an inverse condemnation. This removes any distinction between inverse condemnation and search and seizure.

Grimm did not plead either a physical or regulatory taking. A physical taking claim requires a "permanent physical occupation," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), which was not alleged. A regulatory taking claim requires that the property owner be denied "economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir.

1996). Grimm does not plead that any economically viable use of his property was denied by the citrus canker inspection, and he would have no basis for such a contention.

The philosophy of the courts has been to consider a search a search and a seizure a seizure:

> Cassettari also argues that when the County took his property without paying him for it, the County violated his fourth amendment right to be secure against unreasonable seizures. This argument is without merit. A claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments.

See Cassettari v. County of Nevada, 824 F.2d 735 (9th Cir. 1987). Grimm suffered a search, but not a seizure. Case law does not extend to consider every purported violation of a liberty interest to be an act of inverse condemnation.

Grimm also argues that the possibility of re-entry onto land one or twice a year in the future amounts to a permanent physical occupation. The mere possibility of a future search does not amount to a permanent or continuous taking, as was addressed in *Loretto*. There is no continuous passing to and fro. The inspections are rare and irregular, and will cease with the termination of the CCEP.

Grimm argues that *Hope* supports his takings claim because mere novelty does not preclude application of established legal principles (Petition at 8). This argument does not change the analysis. First, Grimm has not identified any existing body of case law that would put anyone on

notice, or that even supports the position, that a warrantless inspection without seizure equates to a taking under Fifth Amendment jurisprudence. Second, the Department employees did not seize Grimm, as he argues (Petition at 9). It was allegedly a deputy sheriff—not the Department employees—who Grimm complains "seized" his person by escorting the Department employees. Regardless, the sheriff's actions in this case did not amount to a seizure or a restraint of Grimm's liberty. Grimm was never under any restraint and was, by his own factual account, free to leave or enter his dwelling at any time. A temporary prohibition on the right to exclude others from one's yard does not constitute a seizure or an infringement on one's personal liberty interest. The Eleventh Circuit appropriately rejected this argument.

IV. THE DISTRICT COURT CORRECTLY DISMISSED GRIMM'S EQUAL PROTECTION CLAIM BECAUSE GRIMM DID NOT ALLEGE DIFFERENTIAL TREATMENT OR DISCRIMINATORY MOTIVE.

Grimm argues that the search of his property violated his right to equal protection under the Fourteenth Amendment (Petition at 11). The district court held that Grimm failed to plead a violation of his right to equal protection because Grimm did not plead he was treated differently or that there was any discriminatory motive or purpose. Grimm contends that the classification of his property as "quarantined" is a specific class and then confuses the Fourth Amendment with equal protection principles (Petition at 12). These doctrines do not overlap, and the Department's mere inspection of citrus trees within a zone of exposure to canker-infected trees does not suggest discriminatory motive or purpose or include Grimm in a protected class. *Cross v. State of Alabama,*

State Dep't of Health and Mental Retardation, 49 F.3d 1490, 1507-8 (11th Cir. 1995). Again, the Eleventh Circuit appropriately rejected this argument.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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